FREEDOM OF INFORMATION
AND
PRIVACY ACTS

SUBJECT: CUSTODIAL DETENTION

DETCOM

DEPARTMENT REFERRED AND RETURNED MATERIAL

FEDERAL BUREAU OF INVESTIGATION

NOTICE

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STANDARDS USED FOR INCLUDING NAMES IN THE SECURITY INDEX

On the following pages are listed the old standards used in determining whether a subject's name should be included in the Security Index. The net effect of the revised standards is to place a cut-off date prior to which the subversive activities of an individual will not qualify him for the Security Index unless those activities are of such a pronounced nature as to clearly and unmistakably depict the subject as a dangerous individual who could be expected to commit acts inimical to the security of the country in time of an emergency.

In addition, the revised standards in effect require evidence which would cause a hearing board to hold a subject whereas some of the old standards resolved a case in favor of security.

STANDARDS FOR INCLUSION IN THE SECURITY INDEX

Individuals who, through investigation, have been disclosed as falling in certain categories can be classed as definitely dangerous or potentially dangerous to the internal security of the country and should be included in the Security Index. As indicated above, it is not possible to categorize all subjects of security investigations because of their varying degrees of subversive activity and revolutionary dispositions. Therefore, the following standards must not be relied upon as all-inclusive but must be used as a guide in assisting you in determining whether a subject should be recommended for inclusion in the Security Index.

Any individual who comes within one or more of the following categories shall be considered for inclusion in the Security Index.

(A) Any individual known to be currently engaged in espionage activities.

(B) Any individual who has knowledge of or who has given or received instructions or assignment in espionage, counter-espionage or sabotage services or procedures of a government or political party of a foreign country -- except where such activity was obtained for lawful purposes on behalf of the United States Government or where such activity has been offset by subsequent cooperation with the United States Government.

(C) Any individual who has participated in the past in any act of espionage, counterespionage, sabotage, or any attempt or conspiracy to commit any act of espionage, counterespionage or sabotage for a foreign power or foreign political party against the interests of the United States -- except where such activity has been offset by subsequent cooperation with the Government of the United States.

(D) Any individual who has been active at any time in the espionage, counterespionage, sabotage service or procedures of any basic revolutionary organization or World Communist Movement -- except where such activity has been offset by subsequent cooperation with the Government of the United States.

(E) Membership in basic revolutionary organization --

(I) Any individual who is known to have been a member of one of the basic revolutionary organizations after January 1, 1949, and who is not known to have defected therefrom or his activities have not been offset by cooperation with the United States Government.

(II) Any individual who is known to have been a member of a basic revolutionary organization prior to January 1, 1949, who is not known to have defected therefrom or his activities have not been offset by cooperation with the United States Government and:

(A) Has had years of training and experience in the organization.

(B) Has been responsible for actual execution of the organization's orders.

(C) Has received special training in the organization or has had training in the Lenin School or Far Eastern Institute in Moscow.

(D) Has occupied one or more positions of leadership in the organization.

(E) Has at any time been involved in the Red Army Intelligence, the MVD, or MGB, or intelligence service of any foreign country.

(F) Has been used as a courier or mail drop by the revolutionary organization.

(G) Has served in the armed forces of any country.

(H) Served in the Loyalist Forces in Spain during the Spanish Civil War.

(I) Served with the Office of Strategic Services during World War II.

(J) Is employed by a municipal or state government or the Federal Government.

(K) Is employed in or connected with any industry or facility vital to the national defense, health or welfare.

(L) Is employed in any position having potentialities for espionage or sabotage.

(M) Who has access to explosives, chemicals, weapons, ammunition or other material or equipment which could logically be utilized by revolutionary groups in an armed uprising.

(N) Has had experience as a picket captain, strong-arm man or has otherwise actively participated in violent strikes, riots or demonstrations.

(O) Is employed as an organizer or official of a labor union.

(P) Has held positions which determined the destiny of front or mass organizations.

(F) Membership in front organizations only

Any individual who is not known to have held membership in one of the basic revolutionary organizations but who has continued to adhere to the policies and doctrines of revolutionary groups subsequent to the outbreak of Korean hostilities (June 25, 1950) by continuing activity in the affairs of one or more front organizations in a leadership capacity or by active participation in the furtherance of the aims and purposes of the front organization.

(G) Espousing the line

Any individual who has not been determined to have been a member of or associated with either a basic revolutionary organization or front organization but who has continued to adhere to the policies and doctrines of revolutionary groups since the outbreak of Korean hostilities (June 25, 1950) by espousing the line of such organizations.

(H) Independent adherence to revolutionary ideology

Any individual who has not been determined to have at any time been a member of or to have associated with any basic revolutionary or front organization but has by statement or action declared his continued adherence to and support of the revolutionary ideology of a foreign government or foreign political party as opposed to the best interests of the United States Government, or any individual who, because of anarchist or revolutionary beliefs, is likely to seize upon the opportunity presented by a national emergency to endanger the public safety and welfare.

[illegible]ffice [illegible]em[illegible]ndu[illegible] • UNITED STATES GOVERNMENT

[illegible] DIREC[illegible] DATE: April 23, 1948

[illegible] Execu[illegible] Confer[illegible]

[illegible] meet[illegible] of the [illegible]utive Conference on April 22, 1948, atten[illegible] by Me[illegible] Tamm, [illegible]avin, Tracy, Rosen, Mohr, Parsons, Carls[illegible] Nease [illegible] Ladd, [illegible] questions raised by the New York Office with [illegible]rence [illegible] cooperati[illegible] with state and local law enforcement offic[illegible] in the [illegible]vestigat[illegible] of Communist activities was discussed.

[illegible] conferen[illegible] was advi[illegible]ed that the New York Office had been contacted [illegible] the Ch[illegible] Criminal Investigator of Suffolk County, who is a gradu[illegible] of the FBI National Academy, advising that they are considering the po[illegible]ibility of instituting a program whereby their investigative force, [illegible]mbering twenty-two investigators, will investigate the activities [illegible] the Communist Party; that, however, he did not desire to institute [illegible] plan without first consulting with the Bureau.

[illegible] Conference was advi[illegible]ed that the New York Office had raised the fo[illegible]wing [illegible]stions:

1. Should we, when requested for advice by [illegible] law enforcement agencie[illegible], discourage the conducting of investi[illegible]gations of Communist activity by them in their local communities?

2. Should we adopt a [illegible]tral attitude in response to inquiries of th[illegible] nature, [illegible] them that this is a matter for them to de[illegible]ide for themselves?

3. Should we encourage them, tacitly or otherwise, in undertaking such a program, bea[illegible]ing in mind that local law enforcement agencies have a definite responsibility in preserving order, protecting city-owned utilities, etc.?

4. In the event a program for the investigation of Communist activity is undertaken by a cooperative local law enforcement agency, should we encourage them to furnish to us information collected by them, or should we adopt a strictly "hands off" policy regarding such investigations on their part?

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[illegible] conference was of the unanimous opinion that the Bureau should adopt [illegible] neutral attitude in regard to all inquiries received from local law en[illegible]forcement agencies with reference to this program; that the Bureau should [illegible] either encourage or discourage the setting up of such a subversive squad; that in the event it was determined that such a subversive squad was se[illegible] up, arrangements should be effected whereby the local field office would [illegible] furnished the results of any investigation conducted by them.

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[illegible] Con[illegible] also rec[illegible]mended that the SACs might confidentially adv[illegible] [illegible] [illegible]nforcement [illegible]fficials contacting them, that it was the Bur[illegible] [illegible] in[illegible] [illegible], in keepi[illegible] with the FBI's responsibility in the int[illegible] [illegible] [illegible]field in an emergency, to count upon receiving assistance fro[illegible] [illegible] [illegible] enforcement ag[illegible]ncies the same that was done in the last war, [illegible] [illegible] advise the la[illegible] enforcement agencies that they would be cal[illegible] upon [illegible] assist in any necessary apprehensions. It was felt tha[illegible] [illegible] [illegible] tend to reassure the local law enforcement agencies.

Respectfully,
For the Conference

Clyde Tolson

E. A. Tamm

[illegible handwritten notes]

STANDARD FORM NO. 64

PERSONAL – Confidential

Office Memorandum • UNITED STATES GOVERNMENT

TO : Tom C. Clark, Attorney General

DATE: July 11, 1946
TLC:FFS:LIP

FROM : Theron L. Caudle, Assistant Attorney General,
Criminal Division

SUBJECT: Detention of Communists in the event of sudden difficulty with Russia.

You have asked for my views concerning what legislation would be required, and what steps should be taken, in order properly to protect the internal security of the United States, in the event of sudden hostilities with Russia, by detaining members of the Communist Party. This matter should probably be divided into two main topics, first, the needed legislation, and second, suspension of the privilege of the writ of habeas corpus.

I. Legislation Enabling the United States to Detain Communists

This question is probably not too difficult. In the event of a sudden outbreak of hostilities between the United States and Russia existing legislation, I believe, would serve at least as a stopgap until Congress enacted more stringent laws, which it would do quickly if necessary.

Undoubtedly the next war, if there is one, will dwarf all previous conflicts and justify resort to any type of measure which might be needed for the security of the United States. A statute such as the British Defense of the Realm Acts, which were passed by Parliament in both World Wars, 1/ might be justified. The British statute in force during World War II went so far as to authorize the Secretary of State to detain "persons whose detention appears to the Secretary * * * to be in the interests of the public safety or the defense of the realm" and the British courts have expressed the view that such drastic action, under the stress of the emergency of modern war, is not out of accord with the traditional liberty of the British subject. 2/ A third World War

1/ Defence of the Realm Act, 4 & 5 Geo. V, c. 29 (1914); Defence of the Realm Consolidation Act, 5 & 6 Geo. V, c. 8 (1914); Emergency Powers (Defence) Act, 2 & 3 Geo. VI, c. 62, Sec. 1 (1939).
2/ Liversidge v. Sir John Anderson (1942), A.C. 206. The World War I legislation was also upheld by the courts. Ronnfeldt v. Phillips, 35 TLR 46 (KB 1918); Rex v. Halliday (1917), A.C. 260.

involving atomic bombs, robot planes and bombs, long-range bombing planes, parachute troops, etc., is likely to change our concepts of what the government should and should not do respecting individual rights. However, such type of legislation obviously could not be obtained in advance of actual hostilities or as a precautionary measure.

The Act of March 21, 1942, c. 191, 56 Stat. 173, (18 U.S.C. Sec. 97a), the statute under which the program of relocating persons of Japanese ancestry was conducted, could and should be utilized immediately in the event of serious trouble with Russia. This statute makes it a misdemeanor for anyone to enter, remain in, leave or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War or any military commander designated by him, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander. Under it the President issued E.O. No. 9066 on February 19, 1942 (7 Fed. Reg. 1407), authorizing the Secretary of War to prescribe military areas. This was done on the West Coast by the general designated by the Secretary of War, and provision was made by a series of orders for the relocation of Japanese and for their detention—whether or not United States citizens—in relocation centers for periods depending upon the determination of their loyalty. The detention, of course, was effected by orders declaring relocation centers to be military areas or zones under 18 U.S.C. Sec. 97a, and by other orders prohibiting persons in those areas from leaving them except pursuant to regulations. As you know, much of the actual relocation program was carried out by the War Relocation Authority set up by the President under E.O. 9102 dated March 18, 1942 (7 Fed. Reg. 2165), but it is unnecessary here to go into the details of its functions.

Three cases were decided by the Supreme Court involving this statute. The government won two of them and lost the third, but these decisions nevertheless indicate that this statute could be used to detain all Russians and Communists, whether or not American citizens, during the initial period when speed is of the essence, and to detain those shown to be disloyal to the United States as long as necessary.

The first of these cases, Hirabayashi v. United States, 320 U.S. 81 (1943), upheld the validity of curfew regulations imposed upon Japanese residing on the West Coast. The defendant's conviction under Sec. 97a of Title 18 was affirmed without dissent, three justices writing concurring opinions. The majority held that E.O. 9066 and the statute were each an exercise of the power to wage war conferred upon Congress and the President by Articles I and II of the Constitution, that the actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early part of 1942, and that the orders were defense measures made for the purpose of safeguarding the military

areas in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As to the attack on the curfew because it applied to citizens of the United States who were of Japanese ancestry and not to other American citizens, the Court pointed out the reasons why a distinction could be made, in time of war with Japan, between citizens of Japanese ancestry and other citizens. It went on to say that the circumstances justified the military in believing that restrictive measures respecting American citizens of Japanese ancestry were urgent, and that the "fact alone that attack on our shores was threatened by Japan rather than another enemy power set those citizens apart from others who had no particular associations with Japan." 3/ (p. 101).

The second case, Korematsu v. United States, 323 U.S. 214 (1944), involving the power to exclude United States citizens of Japanese ancestry from areas designated under the statute and Executive Order, was decided in favor of the government with one justice writing a concurring opinion and three justices dissenting. The defendant was convicted of remaining in such an area contrary to the exclusion order of the commanding military authority. The majority opinion begins with a statement that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect, but that that does not mean that they are all unconstitutional since pressing public necessity may sometimes justify their existence. Exclusion from a threatened area in war time was held to have a definite and close relationship to the prevention of espionage and sabotage, like the curfew regulation involved in the Hirabayashi case. The Court was not unmindful of the hardships imposed by the exclusion order upon a large group of American citizens but felt that hardships are a part of war which leaves its impact upon all citizens alike; while compulsory exclusion of groups of citizens from their homes is inconsistent with our basic governmental institutions except under circumstances of direst emergency and peril, nevertheless when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

The third case is Ex parte Endo, 323 U.S. 283 (1944), which was unanimously decided against the government, two justices separately concurring. This was a habeas corpus case where the petitioner, an American citizen of Japanese ancestry, challenged her detention in a relocation center. The government conceded that petitioner was a law-abiding and loyal citizen of the United States; she was not being held pending a determination of her loyalty. The Court said that Miss Endo must be given her liberty since the War Relocation Authority had no authority to detain citizens who were concedingly loyal. However, the Court went no further than that; it specifically said that (p. 301) "we do not mean to imply that

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3/ The Court made clear (p. 102) that it was deciding only that the curfew order as applied in this case, and at the time of its application, was within the boundaries of the war power.

detention in connection with no phase of the evacuation program would be lawful"; that it would assume that "some such power might indeed be necessary to the successful operation of the evacuation program"; and that for the purposes of this case "initial detention in Relocation Centers was authorized." Hence this case very clearly recognizes that under Sec. 97a Japanese citizens could be detained <u>if they were disloyal or while the government was determining that question</u>.

In the event of war with Russia Sec. 97a should be immediately utilized to set up a relocation procedure under which Communists would be detained until such time as it might be ascertained that the particular individual is not dangerous to the government. E.O. No. 9066, *supra*, authorizing the Secretary of War to prescribe military areas, would require little change, 4/ although new proclamations of the military would have to be made. They could follow the old ones, referring (1) to all citizens and nationals of the Union of Soviet Socialist Republics, and (2) to all persons who are now or have at any time in the past been members of the Communist Party, or of any party, organization, faction or group which advocates the overthrow of the government of the United States or adherence to the policies and programs of its enemies.

The necessity for (1) is self-evident. Regarding (2), it obviously cannot be limited to members of the Communist Party since if a number of known Communists were detained it would undoubtedly turn out that most of them were not actually members of the Party at the time of the detention.

As said above, Sec. 97a could be utilized in an emergency as it now stands. Whether we should ask an amendment at the present time, when peace is supposedly almost here, is a question of policy. In any event, the 79th Congress is about to adjourn and, unless a special session is called, nothing could be done looking toward new legislation until 1947. The important thing at present is that, if sudden trouble develops during the adjournment, Sec. 97a can be utilized until a special session of Congress can be convened.

I should point out that Sec. 97a is not war time legislation in effect only for the "duration and six months." By its language

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4/ E.O. 9102, providing for the War Relocation Authority, is obsolete and a new relocation program would have to be commenced.

it is a permanent statute. However, its penal provisions become operative only upon the designation of a military area or zone and the issuance of restrictions, etc., by the military. Current designations and restrictions were based upon the war power; they will fail with the official termination of the present war. I recommended in my memorandum of June 21, 1946, to the Assistant Solicitor General, regarding the recommendations of the Interdepartmental Intelligence Committee for legislation dealing with the national security, that legislation might be desirable in order to supplement Sec. 97a with a law better designed for peace time use. However, that is beside the point here, for the use in question is not a peace time use. If the statute is ever invoked against Communists it would be either before the present war is officially over or during a new war (or at least a period of national emergency proclaimed by the President) which would give life to the regulations necessary to complement the section. I suggest, for possible future use, certain amendments to Sec. 97a, and am attaching a draft of the revised section. The Supreme Court dealt at some length in the Endo case, supra, on the fact that the legislative history of the statute is silent upon whether Congress intended to authorize detention. While the Court made it plain enough that the statute will support detention under proper circumstances, no harm would result from using clearer language. The section might also specify military or relocation areas, zones and centers instead of merely military areas and zones. Further, it could be specifically made an offense to fail to report to any relocation area, etc., after having been ordered to do so by the appropriate authority. In the Endo case the Court left open the question whether that would violate the statute in its present form. I also suggest making violation of the statute a felony instead of a misdemeanor.

II. Suspension of Privilege of the Writ of Habeas Corpus

A consideration of this problem could hardly be complete without some mention of the possible suspension of habeas corpus. While that has been done very rarely in our history, and undoubtedly should not except in case of direst emergency, it may well be that in another war conditions would be so different from anything in the past that the most stringent steps should immediately be taken. Such a suspension would empower the government to detain anyone whom it desired, and would make any new legislation unnecessary.

The Constitution, Article I, Sec. 9, clause 2, states that "The privilege of the writ of habeas corpus shall not be suspended, except when in cases of rebellion or invasion the public safety may require it." The Constitution does not say that the privilege 5/

5/ It is only the privilege of the writ that is suspended, not the writ itself. Ex parte Milligan, 4 Wall. 2; Ex parte Zimmerman, 132 F.(2d) 442 (C.C.A. 9), cert. den. 319 U.S. 774; Smith, "Martial Law and the Writ of Habeas Corpus", 30 Georgetown L.Jour. 527 (1942).

may be suspended in time of war, it says "rebellion" or "invasion." It would thus have been impossible to suspend habeas corpus in the continental United States during World War II. That would not be true in a future war, however. The United States would be subject to attack by atomic and robot bombs, etc., and while there is dictum in _Ex parte Milligan_, 4 Wall. 2, that the invasion must be actual, under modern conditions bombing attacks or the like would certainly be considered a case of invasion within the meaning of the Constitutional provision. 6/ Suspension of habeas corpus could not be used as a precautionary measure before a break with Russia, but if we should break with that nation we should not hesitate to stretch the word "invasion" to include imminent danger of atomic warfare.

The privilege of the writ of habeas corpus has been extensively suspended only twice in our history, except that General Andrew Jackson refused to honor the writ immediately after the Battle of New Orleans in the War of 1812. 7/ The important occasions when the privilege was suspended were during the Civil War in the United States and during World War II in Hawaii.

During the Civil War President Abraham Lincoln suspended the writ as early as April 1861, when he ordered the commanding general of the Union Army to do so if necessary for the public safety. Thereafter Lincoln issued at least two suspension

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5/ (cont'd.) the writ, as actually happened during the Civil War (see _Ex parte Merryman_, 17 Fed. Cas. No. 9,487 (C.C. Md.)). However, for all practical purposes suspension of the privilege would withdraw from the courts the duty and power of inquiring into the legality of a petitioner's detention by habeas corpus. Cf. _In re Yamashita_, 66 S.Ct. 340.

6/ See _Ex parte Zimmerman_, 132 F.(2d) 442 (C.C.A. 9), cert. den. 319 U.S. 744; and _Ex parte Duncan_, 146 F.(2d) 576 (C.C.A. 9), reversed _Duncan v. Kahanamoku_, 66 S.Ct. 606. In both these cases the Circuit Court of Appeals for the Ninth Circuit observed that the bombing of Pearl Harbor constituted an invasion of Hawaii within the meaning of the provision of the Hawaiian Organic Act (48 U.S.C. 532) which deals with suspension of habeas corpus. The Organic Act, however, goes beyond the Constitution in permitting suspension in imminent danger of rebellion or invasion. See also Charles Fairman, "The Law of Martial Rule and the National Emergency", 55 Harvard L.Rev. 1253 (1942).

7/ General Jackson not only paid no attention to a writ issued by the federal court but imprisoned the judge who issued it. Subsequently the judge fined Jackson $1,000 for contempt of court. Jackson paid the fine and was reimbursed by act of Congress years later, after a long political fight. See e.g., Smith, "Martial Law and the Writ of Habeas Corpus", cited in footnote 5.

proclamations on May 10, 1861 (12 Stat. 1260), and September 24, 1862 (13 Stat. 730), many arrests were made by the military, without warrants, upon suspicion of treasonable activities and designs against the Union. Finally in March 1863, Congress by statute authorized suspension of habeas corpus, 8/ and pursuant to it Lincoln issued his last proclamation, specifically relying upon the statute, on September 15, 1863 (13 Stat. 734). But by that time he had suspended habeas corpus for two years of his own accord and without authority from anyone; for two years he had made arrests without warrants and held men in prison as long as he pleased; both of these being in flat disregard of Chief Justice Taney's decision in 1861 in the Merryman case (17 Fed. Cas. No. 9,487, C.C. Md.). A good history of Lincoln's treatment of the question will be found in Sydney G. Fisher's "The Suspension of Habeas Corpus during the War of the Rebellion", 3 Pol. Sc. Q. 454 (1888).

During World War II the privilege was suspended in Hawaii from December 7, 1941, to October 24, 1944, under the section of the Hawaiian Organic Act (48 U.S.C. 532) which empowers the Governor to do so "in case of rebellion or invasion, or imminent danger thereof, when the public safety demands it." 9/ The principal agitation during the Civil War centered on whether the President himself could suspend the privilege or whether only Congress could do so. There is dictum in Ex parte Bollman, 4 Cranch 75 (1807), and Story said in his Commentaries on the Constitution (Vol. 3, Sec. 1336) that only Congress may suspend the privilege. However, Lincoln did not hesitate to take this step himself, doubtless feeling that the necessity of the occasion justified his action regardless of the views of legal authorities. His Attorney General, Edward Bates, gave Lincoln an opinion in 1861 that the President might suspend the privilege 10/ and in several Civil War cases the courts generally held that the privilege must be suspended by Congress 11/ although one court held to the contrary. 12/

8/ Act of March 3, 1863, c. 81, 12 Stat. 755.

9/ The Circuit Court of Appeals for the Ninth Circuit held this suspension proper in the Zimmerman and Duncan cases, supra. When the Supreme Court reversed the Duncan case (66 S.Ct. 606), however, it was not required to consider this question as by that time the privilege of the writ had been restored. See footnote 5 of the Duncan opinion.

10/ 10 Op. A.G. 74 (1861).

11/ Ex parte Merryman, supra; Ex parte Benedict, [illegible] Fed. Cas. No. 1,292 (N.D. N.Y. 1862); McCall v. McDowell, 15 Fed. Cas. No. 8,673 (C.C. Cal. 1867).

12/ Ex parte Field, 9 Fed. Cas. No. 4,761 (C.C. Vt. 1862); see also Horace Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution" (1862).

The weight of authority holds that the President cannot suspend the privilege of habeas corpus, but this is not unduly important. Should the emergency be grave enough there is enough authority to warrant a Presidential suspension, particularly if Congress was not in session. However, a statute should be sought as soon as the special session which would be called could convene, or if Congress was in session when the President acted it should be asked to ratify his action.

III. Conclusion

I have not attempted to cover in this memorandum the possibility of martial law being declared. In the event of hostilities with Russia martial law might be declared in some areas, if we were subjected to bombing and similar attacks. There would then be no problem of detaining Communists or anyone else, since, of course, the civil courts would be closed and civil law would be superseded by military law.

In conclusion, my view on this general subject matter is that, if relations with Russia become sufficiently bad between now and the convening of the next session of Congress, the President may immediately invoke 18 U.S.C. Sec. 97a and, through appropriate orders of the War Department, can put into effect a relocation—which would really be a detention—program for all Communists, whether or not American citizens.

Further, although suspending the privilege of the writ of habeas corpus is a grave matter, conditions will now be different than ever before. The atomic bomb alone makes a world of difference. If we break with Russia we should forget past concepts of habeas corpus and traditional ideas regarding it and suspend the privilege forthwith. Conditions will undoubtedly justify such action. The suspension should be made by act of Congress, but if the emergency arises during adjournment the President will be justified in suspending the privilege by Executive Order. His action can be ratified by the special session which would be immediately called.

It is doubtless too late to submit any amendments to Sec. 97a to this session of Congress. That is not serious, however. It is safe to say that existing legislation is sufficient to protect the United States during the interim if relations with Russia come to the point where immediate action is essential.

Suggested Amendment to Act of
March 21, 1942, c. 191, 56 Stat. 173, 18 USC Sec. 97a

(Additions to present law are underscored, deletions therefrom in brackets)

Whoever shall enter, remain in, leave, depart or escape from, fail to remain in, or commit any act in any military or relocation area, [or military] zone or center prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions or regulations applicable to any such area, [or] zone or center, or contrary to the order of the Secretary of War or any such military commander, or whoever shall fail to report to any such military or relocation area, zone or center so prescribed after having been ordered to report thereto by the Secretary of War or any such military commander designated by the Secretary of War, shall, if it appears that he knew or should have known of the existence and extent of the restrictions, regulations or order and that his act was in violation thereof, [be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.] be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment.

(F)

PLAN FOR EMERGENCY DETENTION OF
APPROXIMATELY 15,000 DETAINEES.

General.

The Bureau of Prisons, after surveying its institutions and present population, can provide emergency facilities for detaining approximately 12,000 persons in its existing institutions and could also provide for another 3,000 in camps and other types of emergency housing which are presently available. It is proposed that the population of seven penal institutions be consolidated and transferred to other Bureau institutions. In this manner several of the Bureau institutions could be turned over completely for the housing of detainees. It is felt that this plan would be preferable to placing any of the detainees in institutions where other prisoners are held or setting aside portions of existing institutions for this purpose. The suggested plan would provide separate institutions for men in the east, in the middlewest and the far west, with a centrally located institution for women detainees.

Policies and Central Organization.

To supervise these institutions and formulate the necessary policies it is proposed that a separate division of the central office of the Bureau of Prisons be established for this purpose to be known as a "Detention Service." This division would be headed by a skilled institutional man and provided with a staff for the operation of the service. In developing its program and policies this division would bear in mind that the detainees were not criminals and that methods of control, work programs, and recreational activities would be adjusted to the needs and types of persons taken into custody. Detainees, for instance, would be employed only on maintenance activities and other incidental work. They would not be compelled to undertake industrial or agricultural assignments against their will. Generally, the same policies would be followed as applied to prisoners of war held under authority of the Geneva Convention. Personnel would be specially selected and trained for this assignment.

Detention Facilities

In carrying out this plan the country would be divided into three regions for detention of male detainees and one region for female detainees as follows:

Eastern Region

Institution

Federal Correctional Institution, Danbury, Conn.	1,500	
Federal Correctional Institution, Ashland, Ky.	2,000	
Federal Reformatory, Petersburg, Va.	2,000	
Total		5,500

Middle West Region

Federal Correctional Institution, Sandstone, Minn.	1,500	
U. S. Penitentiary, Terre Haute, Indiana	3,000	
Prisoner of War Barracks, El Reno, Okla.	1,200	
Total		5,700

Western Region

Federal Prison Camp, McNeil Island, Wash.	500	
Abandoned Relocation Camps or Army Camps to be Obtained (2)	3,000	
Total		3,500

Female Detainees
(For Entire Country)

Federal Correctional Institution, Seagoville, Tex.	600	600
TOTAL		15,300

It is contemplated that in the event the facilities of the Federal prisons to be vacated for detainees were again badly needed for Federal prisoners, secure camp type institutions would be constructed.

Procedures and Program:

1. Immediate Detention:

Specified local approved jails would be used for overnight detention except where detainees are near the detention institutions, in which case direct commitment would be made.

2. Transportation to Detention Institutions.

Detainees would be transferred from jails to detention institutions immediately. Transportation would be by Bureau of Prisons buses except where an excessive load requires the hiring of private facilities.

3. Examination and Classification.

All detainees would be fingerprinted, photographed and physically and mentally examined upon arrival. Information regarding each detainee should be submitted by the F. B. I. at the time of arrival, if possible. This information, together with the results of the examination and observations at the institution, will be recorded and will furnish the basis for security precautions, job assignments, the approval of visitors and correspondents, etc. Record will be made of all pertinent information about each detainee during the period of detention and will be available for decisions relating to parole or other forms of release.

4. Program

(a) Employment

Detainees will be expected to perform all housekeeping and maintenance tasks about the institution or camp under the supervision of officers. Other work will be provided depending upon the location and facilities of the institution.

(b) Health

Careful attention will be paid to the health needs of the detainees but no unessential reparatory physical or dental work will be done.

(c) Morale

A general program directed toward maintaining and improving morale would be placed in operation. Such a program would include recreation, library privileges and a carefully supervised educational program.

(d) Food.

A balanced ration, comparable to that furnished enlisted soldiers, would be provided.

(e) Clothing.

For reasons of security, detainees would not be permitted to wear their own clothing but would be provided simple work clothing.

(f) Discipline.

The institution would operate under regulations promulgated by the Detention Service and approved by the Attorney General. The nature of disciplinary action and whether such action could be taken for such offenses as refusal to work would depend upon the status of the detainees.

Conclusion.

The foregoing plans and program could be put into effect, perhaps within a few days, if the personnel required to perform these duties were selected in advance and given a briefing on their precise duties and responsibilities. If it should appear that there is more than an even chance that the foregoing program might be implemented, it is believed that the head of the proposed Detention Service should be selected promptly and advised to prepare confidential detailed plans and some of the key personnel needed in the program alerted.

September 10, 1946.

SECRET and CONFIDENTIAL

MEMORANDUM

August 22, 1946

To: The Attorney General

From: H. Graham Morison and Peyton Ford

You requested Peyton Ford and me to follow up on the memorandum received from the Director of the Federal Bureau of Investigation as to the handling of Communists who are American citizens in the event of war with Russia.

On Tuesday, August 20, we had a conference with Mr. Ladd and Mr. Strickland of the FBI and went over the problem thoroughly. They pointed out that in the event of such hostilities there would be approximately 11,000 officers of the Communist Party -- all American citizens -- who would constitute the greatest threat in the way of sabotage or otherwise and their belief was that authority should be found to pick these people up and detain them. We explored the possibility of constituting certain areas of the U.S. by executive order as military areas with authority to exclude therefrom any persons and to prohibit any person from entering the area. Messrs. Ladd and Strickland felt, however, that this would not be effective unless the whole U.S. was constituted a military area and one area designated for the confinement of these people. The difficulties of such an approach by executive order even if the war was in progress was pointed out. It was agreed among all that the problem should be discussed with the proper people at the War Department with the idea of discussing their plans in relation to our responsibility. The possibility of detention facilities was also discussed and it was agreed this was a problem for joint consideration. Messrs. Ladd and Strickland further agreed to prepare a memorandum analyzing the list of Communist officers with reference to their places of residence, their general backgrounds, etc. In addition they will also give the standards by which such persons were determined to be potentially dangerous.

On the same day, Tuesday, August 20, I made an appointment with Under-Secretary Kenneth Royall at the War Department and Mr. Ford and I had a short conference with him, requesting that he put us in touch with the proper parties in the War Department to discuss this problem fully. Secretary Royall promised to talk to Secretary Patterson

about it and advise us. Accordingly on Wednesday, August 21, General Green, Judge Advocate General of the Army and Colonel Hoover met with us in my office and the whole problem was explored. They indicated their gratification in knowing that we were giving consideration to the problem and evolving some plan of operation. They also advised that they had done considerable planning about this problem and would submit to us their ideas as to how the entire problem might be handled. It was generally agreed that an executive order should be prepared for immediate use along the lines of the executive order employed in the last war on the West Coast to exclude persons from military areas, subject to the modifications suggested by the Criminal Division and such other modifications as the experience of the War Department indicates is necessary. It was also suggested that the list of Communists with which we are concerned might be carefully scanned by the War Department in order that the major portion of these people be classified under military standards for immediate induction into the military under the draft law. This to be done in a way as not to give substance to the objection that a class draft is being made. It was also agreed that draft of legislation should be prepared for any interim reconvening of the present Congress or for the next Congress along the lines of the British "Defense of the Realm Act". It was agreed by all that such proposed legislation should be evolved by joint conferences and that when we are agreed, that the whole problem should then be presented to the Cabinet for a decision.

General Green agreed to furnish us with a memorandum on the problem very shortly and to meet with us again when he has a concrete plan to suggest.

Mr. McGregor has been advised of what we have done in this matter and we propose to keep him posted until your return.

September 12, 1946

MEMORANDUM OF AUGUST 22 CONTINUED

General Green submitted on August 29th a draft of an Executive Order to meet the interim requirements of the situation which would authorize the Secretary of War to proscribe military areas and zones pursuant to the Act of March 21, 1942, Section 97I.

although It is recognized that the order proposed by the War Department is a satisfactory stop-gap for the immediate present, it was decided after a full discussion that long-range and effective measures should be planned which would deal more effectively with the problem. Accordingly there has been drafted, and attached hereto, an Executive Order suspending the privilege of the writ of habeas corpus, a draft of a bill ratifying the President's suspension of the writ of habeas corpus and suspending the writ by statute, and, a draft of a bill providing for the detention of citizens or any persons whose loyalty to the United States is subject to question and establishing machinery for a detention system and for the administrative review of the discretion exercised by the Attorney General in determining the question of loyalty of persons who are detained.

You will see that in all of these it was decided that the Attorney General alone, as the civil legal officer of the Government, should have the entire power with reference to detention and administration of the problems arising under the suspension of the writ. This does not prevent, of course, a system whereby upon the recommendation of the Army or Navy persons other than those recommended to be detained by the FBI could be detained. It is our thought that when we sit down with General Green again a plan for joint operations could be set up so that there would be no conflict between the military and civil departments of Government.

Before continuing it seemed necessary to get a report on detention facilities required to carry out this program. Accordingly Jim Bennett has prepared, and it is attached hereto, a confidential report showing that in very short order prison facilities of the Bureau of Prisons could be made available to house approximately fifteen thousand persons. All other prisoners would be moved out of the penal institutions to be dedicated to this purpose so only detainees would be housed in such facilities. Mr. Bennett also makes the recommendation that should a state of emergency become imminent a head of this detention service should be selected and

advised to prepare detailed plans.

It is our thought that if you agree with the direction in which we have gone in meeting this problem, that we should have a joint meeting with representatives of the FBI, the Army, the Navy and the Bureau of Prisons to effect an agreement on the steps recommended here and work out the detailed plans for carrying this plan into effect in the eventuality of hostilities.

The final problem, and to us the most important one, concerns the classification of persons who are now, or may hereafter be, suspected of disloyalty. You will recall that such a program of classification was inaugurated before Pearl Harbor in the Criminal Division but that the classification program broke down after Pearl Harbor so that it was necessary to authorize the FBI to pick up anyone they suspected. It occurs to us that we may have time now to avoid any such situation if proper standards of classification of persons can now be adopted and agreed upon by all agencies of the Government interested. Once standards have been established the final and most important problem must be solved, and that is evaluating facts and allegations of fact pertaining to persons now classified or who may hereafter be classified. It is our opinion that it is highly important — since we may be dealing with a large group of citizens — that no one be detained unless the facts about their disloyalty are established to be true or that the surrounding facts create such a suspicion of disloyalty as to substantiate the detention as a reasonable exercise of the authority to be conferred upon you, keeping in mind that the plan here proposed calls for an administrative review of the discretion exercised and a further court review of the administrative decision. It is proposed, if you agree with the importance of this, that a selective analysis of the FBI list be made now with the view of establishing certain evidentiary standards for the classification of persons who are now on this list or who may be hereafter placed on the list and to explore the requirements personnelwise for effecting the review and classification of all persons who are now listed, looking to the final classification of these persons in accordance with the standards to be adopted. A report will be made to you on such requirements.

We recommend, finally, that if and when these plans have been finally worked out and agreed upon you should confidentially discuss them with the President and recieve his informal approval of this method of approach.